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Published in:
Scottish Feminist Judgments

Publication date:
2019

Document Version
Peer reviewed version

Author Accepted Manuscript version of Ferguson, P 2019, McKearney v HM Advocate 2004 JC 87 Judgment. in S Cowan, C Kennedy & V Munroe (eds), Scottish Feminist Judgments: (Re)Creating Law from the Outside In. 1st edn, Hart Publishing.
https://www.bloomsburyprofessional.com/uk/scottish-feminist-judgments-9781509923267/

McKearney v HM Advocate 2004 JC 87

LJ-C Gill, Lord McCluskey, Lady Ferguson

16 January 2004

Opinion of Lady FERGUSON

Introduction

[1] This appeal addresses the issue of *mens rea* in the common law crime of rape. The appellant argues that his conviction for the rape of the complainer, his former girlfriend, should be quashed on the basis that the trial judge misdirected the jury. I agree with the majority of this court that the appeal must succeed. However, some of my reasons differ from those which your Lordships have expressed. It is therefore proper that I should state the basis on which I concur in this disposal.

The Evidence

[2] The appellant broke into the complainer's flat in the early hours of the morning – a fact which he admitted during his police interview. The complainer became aware of this intrusion into her home when she was awakened by the appellant sitting astride her, compressing her throat. In an ordeal which lasted for several hours the appellant repeatedly threatened to kill her. She was terrified, believing that he intended to carry out these threats. On more than one occasion he again put his hands around her neck. Some four hours after the initial assault, the appellant instructed the complainer to go back to her bed and to sleep. She was reluctant to do so, but the appellant told her to lie on the bed. She did so and the appellant lay down beside her. He inserted his penis into her vagina. The complainer's testimony was that she did not consent to this.

[3] The solicitor advocate who represented the appellant at trial suggested to the jury that they should acquit his client if they found that he had acted under an honest belief that the complainer had consented to intercourse. The trial judge instead directed the jury to disregard the question of 'honest belief' and to convict the appellant of rape if they found that intercourse had taken place, and that this was against the complainer's will. The jury deleted some words from the charge, including that the appellant had attempted to murder the complainer, and he was convicted of having forced entry to the flat, repeatedly threatening to kill her, assaulting her by compressing her throat, and raping her.

The Issues

[4] As Lord Justice Clerk Gill notes, the appellant's submission raises four issues:

(1) whether the trial judge failed properly to direct the jury on the question of *mens rea*;

(2) whether he erred in directing them to disregard the question of honest belief;

(3) whether distress *de recenti* on the part of the complainer was evidence of *mens rea* on the part of the appellant; and

(4) whether the jury were entitled to hold that the complainer remained frightened of the appellant when he had intercourse with her.

In order to determine these issues, we must consider the development of the definition of rape in our law.

The *Actus Reus*

[5] In his *Commentaries on the Law of Scotland Respecting Crime* (Bell's edition, 1844) Baron David Hume defined rape as 'carnal knowledge' of a female person which has been obtained 'against her will, and by force' (Hume, I, page 302). While it had to be proven that the accused had overcome the complainer's will, the amount of resistance the complainer was expected to offer varied according to

the circumstances, including her age, health and robustness. According to Hume, intercourse could be said to have taken place 'against the complainer's will' where she was too frightened to offer much resistance:

> It is evidently no consent, to do away with the guilt of rape, if the woman only discontinue her resistance out of fear of death. (*ibid*)

In *Barbour v HM Advocate* 1982 SCCR 195, Lord Stewart directed the jury that:

> The important matter is not the amount of resistance put up but whether the woman remained an unwilling party throughout. The significance of resistance is only as evidence of unwillingness. (pages 197–98)

In the recent *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466, this court decided that the use of force was no longer an essential element in the definition of rape, and that its *actus reus* consists in having sexual intercourse with a person who does not consent. The previous insistence that the accused had to have overcome the complainer's will had meant that a sleeping woman could not be raped, nor could one who had become incapacitated due to intoxication through alcohol or drugs where these had been voluntarily consumed, since in neither of these situations could it be said that that complainer's will had been overcome *by the accused*. In focusing on a lack of consent, the redefinition in *Lord Advocate's Reference (No 1 of 2001)* means that rape is committed where the accused has sexual intercourse with a woman who is not a willing participant, but there is no longer a requirement for the Crown to prove that the complainer offered resistance, or that the accused had 'overcome' this.

The *Mens Rea*

[6] As this court noted in *Lord Advocate's Reference (No 1 of 2001)*, Hume did not address the issue of the *mens rea* of rape. Few other cases have considered this aspect of the definition, in large part

because, prior to that case, proof that the accused had used force in order to achieve intercourse was taken also to constitute proof that he was aware that the complainer was not a willing party. Lord Cullen in *Lord Advocate's Reference (No 1 of 2001)* defined the *mens rea* of rape as being present where the accused

> knows that the woman is not consenting or at any rate is reckless as to whether she is consenting. (page 476, paragraph 44)

Similarly, the Lord Justice Clerk addresses the requirement of *mens rea* in the case before us, at paragraph 8 of his judgment:

> the *mens rea* of the crime consists of an intention on the part of the accused to have intercourse with the complainer, together with knowledge on his part that she does not consent, or with recklessness on his part as to whether or not she does.

I concur with the Lord Justice Clerk's conclusion that where the Crown cannot rely on the use of force as evidence that the accused was aware that the complainer was not consenting then a specific direction on this point is now essential. Since the trial judge gave no such direction, I agree that the appellant's conviction must be quashed, giving the Crown the opportunity to consider whether they wish to seek authority for a fresh prosecution in accordance with section 118(1)(c) of the Criminal Procedure (Scotland) Act 1995.

[7] Given that this First Ground of Appeal is sustained, it may be thought unnecessary to consider the remaining grounds. However, since they raise fundamental aspects of the *mens rea* of rape they too require to be addressed. As the Lord Justice Clerk's formulation of the second issue makes clear, the appellant maintains that the trial judge should also have instructed the jury about the effect of an honest but mistaken belief in consent. In response, the Lord Justice Clerk finds:

> If the jury hold that the complainer did not consent, because they believe her evidence to that effect, they must nevertheless consider whether or not the accused honestly believed that she did. In all such cases, in my view, the judge should give a specific direction on the point. (page 91, paragraphs 13–13)

In addressing this point, Lord McCluskey relies upon the cases of *Meek and Others v HM Advocate* 1982 SCCR613 and *Jamieson v HM Advocate* 1994 JC 88, 1994 SLT 537. He cites Lord Justice General Emslie's statement in the latter that:

> in rape cases, the man's belief need not be shown to be based on reasonable grounds for his belief to be relevant as a ground of acquittal. (1994 JC 88, page 93)

Both *Meek* and *Jamieson* followed the English case of *DPP v Morgan* [1976] AC 182, [1975] UKHL 3, [1976] AC 182, in which the appellants were convicted of rape. Three of the defendants, who were RAF officers, maintained that Morgan, their senior officer, had invited them to his house after a night of heavy drinking and informed them that, although his wife would resist having sexual intercourse with each of them, she would in fact be consenting. The trial judge directed the jury that if it found that the three junior officers had acted under an erroneous belief that Mrs Morgan had been consenting, it could only acquit them if it also found that this belief was a reasonable one for them to have formed in the circumstances. It is worth noting that the complainant had made it quite clear that she was not consenting, and that she required medical treatment for injuries she received during the attack. In granting leave to appeal, the Court of Appeal certified a question of public importance:

> Whether in rape the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds. ([1976] AC 182, page 205)

The House of Lords answered this question in the negative, holding that in a charge of rape there was no requirement that an erroneous belief in consent had to be reasonably held.

[8] Delivering the opinion of the court in *Meek*, Lord Emslie observed that:

> [A]n essential element in the crime of rape is the absence of an honest belief that the woman is consenting. The criminal intent is, after all, to force intercourse upon a woman against her will and the answer to the certified question given by the majority of their Lordships in *Morgan* is one which readily accords with the law of Scotland. (page 618)

This observation was *obiter dictum*, the court having decided that in the circumstances of the case there was no need for a direction to be given on the effect of a mistaken belief in consent. The *dictum* was not supported by any previous Scottish authority on mistake and was expressed without reference to any such authorities. *Meek* has been criticised as a decision which is difficult to reconcile with other areas of our criminal law – a point to which I will return below. Despite this, Lord Emslie's approach was approved in *Jamieson* by Lord Justice General Hope:

> [T]he *mens rea* of this crime includes the intention to have intercourse with the woman without her consent. The absence of belief that she was consenting is an essential element in it. If a man has intercourse with a woman in the belief that she is consenting to this, he cannot be guilty of rape. … [I]t will be open to the jury to accept his evidence on this point even if he cannot give grounds for it which they consider to be reasonable, and if they accept his evidence they must acquit him. (1994 JC 88, page 92)

The principle in *Meek* was also applied to indecent assault in the case of *Marr v HM Advocate* 1996 JC 199, 1996 SLT 1035.

[9] In my opinion, this court took a wrong turn in following *Morgan* in *Meek* and *Jamieson* and requiring that a mistaken belief in consent need not be a reasonable one in order to exculpate the

accused. This court is slow to reinterpret the common law, and rightly so, but when it has made an egregious error – as I believe it did in these cases – it is in its power to correct this. The case before us presents an appropriate occasion on which to set the law back on its proper course. There are four arguments for doing so, namely:

(i) in other aspects of substantive criminal law, English and Scottish law differ in their approaches to errors which affect *mens rea*;

(ii) there is no principled basis for holding that errors relating to consent in rape cases should be treated differently from other types of errors;

(iii) in any event, *Morgan* is no longer good authority in English law; and

(iv) the approach taken in *Morgan*, *Meek* and *Jamieson* is wrong in principle.

(i) The English and Scottish Law Approaches to Errors which Affect *Mens Rea*

[10] In deciding *Morgan* as it did, the House of Lords noted that the law took a different approach to errors in cases of bigamy: in *R v Tolson* (1889) 23 QBD 168 the defendant had remarried after she had been informed that her first husband had been lost at sea. She was afforded a defence of error only if her mistaken belief that her husband was deceased was both honest and reasonable. Prior to *Morgan*, errors in self-defence likewise had to be based on reasonable grounds: *R v Rose* (1884) 15 Cox CC 540; *R v Chisam* (1963) 47 Cr App R 130; *R v Fennell* [1970] 1 QB 428. These cases were followed, post-*Morgan*, in *Albert v Lavin* [1982] AC 546, where at issue was whether a person might be convicted of assault if he mistakenly and without reasonable grounds believed that he himself was being assaulted. Hodgson J noted that:

> there appears to be no reported instance of a man being convicted of an assault … when he acted, as he believed, in self-defence, but the belief was held to be unreasonable.

> However, nearly all the authorities, when considering self-defence, require that a mistaken belief must be reasonable. (pages 553–54)

Morgan was, however, applied by the Court of Appeal in the later case of *R v Williams (Gladstone)* (1984) 78 Cr App R 276, at page 281, a case involving self-defence. The appellant had gone to the aid of a youth who appeared to be under attack from a man, but in fact the youth was a robber and the man was in the process of detaining him. Williams' conviction for assaulting the victim of the robbery was quashed since the trial judge had misdirected the jury that the appellant's error required to be reasonably held. According to the Chief Justice, Lord Lane:

> If the [erroneous] belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. … [T]he jury should be directed … that … if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; that is so whether the mistake was, on an objective view, a reasonable mistake or not. (page 281)

Morgan was also applied in a subsequent case involving erroneous belief in self-defence to a charge of murder: *Beckford v The Queen* [1988] AC 130.

[11] In contrast to the approach taken in *Williams*, it is well-established in Scots law that a mistake in self-defence will exculpate only if that error was both honestly held *and* reasonable, in the circumstances. The authority for this proposition is the case of *Owens v HM Advocate* 1946 JC 119 in which the appellant had been convicted of murdering a man named Falconer, by stabbing him with a knife. The appellant contended that he had acted in self-defence under the mistaken belief that Falconer also had a knife. The presiding judge had directed the jury that the accused was not justified in using a lethal weapon if he had been 'completely wrong in thinking' that Falconer had a knife in his hand. The conviction was quashed on appeal, the Lord Justice General (Normand) stating:

> [S]elf-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact. (page 125).

What amounts to reasonable grounds was considered in *Crawford v HM Advocate* 1950 JC 67:

> [W]hen self-defence is supported by a mistaken belief rested on reasonable grounds, that mistaken belief must have an objective background and must not be purely subjective. (page 71)

In *McCluskey v HM Advocate* 1959 JC 39, the trial judge directed the jury:

> Before you could find that the accused was justified in killing [the deceased] you would have to be satisfied that he struck the fatal blow for his own protection and to ward off danger to himself, either danger which was actually threatened or danger which might reasonably be anticipated by him. It would not be necessary to find that there was actual danger to the accused; you could uphold the special defence [of self-defence] … if you were satisfied that the accused believed that he was in danger and if you were also satisfied that he had reasonable grounds for so thinking. (pages 39–40)

This formulation was approved in *Jones v HM Advocate* 1990 JC 160, 1990 SLT 517.

[12] The approach which Scots law takes to errors relating to self-defence applies more generally. In *Dewar v HM Advocate* 1945 JC 5, 1945 SLT 114, the appellant was the manager of a crematorium who was convicted of stealing hundreds of coffin lids and two coffins. In modern parlance, one could say that he had recycled the coffin wood, using it to make tea-trays and furniture, or for firewood. His defence was that he believed that this behaviour was common practice in British crematoria. In his charge to the jury the trial judge quoted Macdonald's *Criminal Law* (4th edn, page 24):

> If a person takes, believing that what he takes is his own, or that he has the owner's concurrence, he is not guilty of theft, but his belief must be reasonable and he must prove it.

Dewar's appeal was dismissed, the Lord Justice General (Normand) noting that the presiding judge had

> instructed the jury to consider whether the appellant might have entertained an honest and reasonable belief, based on colourable grounds, that he was entitled to treat the coffins as 'scrap.' … The direction could not have been more favourable to the appellant than it was. (page 13).

In short, Scots law generally treats 'unreasonable errors' quite differently from the way in which they have been treated in English law.

(ii) Should Errors Relating to Consent in Rape Form an Exception?

[13] I can find no basis for holding that unreasonable errors relating to consent in rape cases should form an exception to the general approach our law takes to erroneous beliefs which impact on an accused person's state of mind. Indeed, to make an error as to consent is, in my view, generally far more reprehensible than one concerning self-defence. A person who comes across what appears on the face of it to be an assault by 'A' on 'B' must make a split-second decision about what is taking place. If that decision turns out to be mistaken – if, in fact, contrary to appearances, it is 'B' who is the aggressor (as transpired in both *Williams* and *Beckford*, referred to above), it may be considered harsh to condemn the person who acts from the best of motives, but under an erroneous belief, and this is so even if that belief can be objectively assessed, with the benefit of hindsight, as being one which was not formed on reasonable grounds. The situation in a case of alleged rape is markedly

different. In *Morgan*, for instance, the ordeal suffered by the complainant lasted for some considerable time. As Lord Bridge recounted, Daphne Morgan

> struggled and screamed and shouted to her son to call the police, but one of the men put a hand over her mouth. Once on the double bed the defendants had intercourse with her in turn, finishing with her husband. During intercourse with the other three she was continuously being held, and this, coupled with her fear of further violence, restricted the scope of her struggles, but she repeatedly called out to her husband to tell the men to stop. (page 186)

His Lordship later refers to 'the general picture of a forcible rape against clear protest and resistance on the part of the victim' (ibid). If, then, the defendants had indeed made an error as to Mrs Morgan's consent, this was no split-second decision. Rather, they must have ignored her protestations for the duration of the multiple acts of intercourse. Indeed, in any act of sexual intercourse there is sufficient time to reflect on the willingness or otherwise of the complainer. This, then, is qualitatively different from the momentary lapse of judgment made in rushing to a person's aid in the mistaken belief that they are being assaulted. The law – rightly, in my view – does not allow such a momentary lapse to exculpate an attacker in a case of self-defence, unless the error was one which a reasonable person could have made, in the circumstances. There seems even less justification for excusing one who makes an unreasonable error about whether someone is consenting to sexual intercourse.

(iii) The Status of *Morgan* in English Law

[14] The decision in *Morgan* was reported in the press as affording a 'rapist's charter' and attracted a great deal of criticism. In his Commentary on *Meek*, Sir Gerald Gordon noted:

> It is ironic that the High Court should now declare the identity of the English and Scots law of rape as the basis for their acceptance of such a narrow and controversial decision

> as *Morgan*. In *Morgan* a three-to-two majority in the [House of] Lords overruled a unanimous Court of Appeal; one of the majority peers (Lord Cross of Chelsea) said that a contrary decision would not have been unjust …; one of the minority (Lord Edmund-Davies) dissented because he held that the trial judge's statement of the law was correct on the authorities, but thought that the majority decision was more just; … the Lord Chancellor (who was of the majority) later said that 'The Court of Appeal had formulated the question in a way which I think was probably misleading. I wish that I had refused to answer the question at all and had given my opinion in terms of my speech and said that the question was perhaps not a wise formulation of the problem.' (1982 SCCR 613, page 622)

The law in England and Wales was subsequently amended by s 1 of the Sexual Offences (Amendment) Act 1976 such that the *mens rea* of rape is at present defined as knowledge that the complainant is not consenting or recklessness as to consent.

[15] The law south of the border has recently been amended again; the Sexual Offences Act 2003 received Royal assent two months ago (on 20 November 2003). This legislation follows a UK government White Paper: *Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences* (Cm 5668), published in November 2002, which describes the current law as 'archaic, incoherent and discriminatory' (para 8, page 9) and states that the government intends

> to change the law on sex offences to reflect the fact that the society in which we live is significantly different from that of 50 years ago, which was when most of the present law originated. (page 8, paragraph 5)

The White Paper states that the test of mistaken belief in relation to consent ought to be:

one of reasonableness under the law. This will make it clear that, where the prosecution can prove that there is reasonable room for uncertainty about whether someone was consenting and that the defendant did not take reasonable action in the circumstances to ensure that the other person was willing to take part in the sexual acts, he will commit an offence. 'Reasonable' will be judged by reference to what an objective third party would think in the circumstances. (page 17, paragraph 34)

Rape is defined by section 1 of the 2003 Act as follows:

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

Once the 2003 Act is brought into force, therefore, an erroneous but unreasonable error as to consent will no longer exculpate in a charge of rape.

[16] Since *Meek* and *Jamieson* followed *Morgan*, which is no longer considered good law, this court should now take this opportunity to overrule these cases. This would mean that an error as to consent is required to be both honest *and* reasonable; that is, the mistake must be one which *a reasonable person could have made*.

(iv) *Morgan*, *Meek* and *Jamieson*: wrong in principle

[17] Returning to the second of the Lord Justice Clerk's issues, the solicitor advocate in the case before us invited the jury to consider whether the appellant had mistakenly believed that the complainer had been consenting to intercourse. The presiding judge did not give a specific direction to this effect, but he can only be faulted for failing to do so if there was some evidential basis from which the jury could conclude that the appellant may have made such an error. This requires more than the mere *ipse dixit* of defence counsel. An accused facing a charge of rape may choose not to put forward any defence, may claim that the complainer did in fact consent, or may claim that he made an error as to consent. As a matter of logic, the last of these alternatives means that he subsequently realised that there was in fact no consent. In the present case, the appellant maintained during his police interview that the complainer had 'encouraged' him to have intercourse. Since the appellant did not give evidence at his trial, the only evidential basis to support a contention that he formed an erroneous belief as to consent must come from the complainer's testimony. A brief reminder of that testimony is therefore required at this point.

[18] As the trial judge has narrated, the complainer testified that she awoke to find the appellant astride her, having broken into her home in the middle of the night. He compressed her throat until her eyes bulged. At one point he stated: 'I'm just going to kill you now' and went to put his hands around her throat again. She began to cry and he let her go to the bathroom. While she was there she heard the appellant talking to himself, saying: 'Just do what you came to do. Just kill her.' She came out of the bathroom and was crying again. He then moved his hand on to her left breast. The complainer made clear that she did not want to have sexual contact with him. He reacted by becoming angry again and accused her of being willing to have sexual intercourse with other men, but not with him. He then said that he had had enough and was going to 'do it', which the complainer took to mean that he was intending to kill her. He again put his hands around her throat. There followed an argument

about the appellant's lack of access to the complainer's son. The appellant appeared to calm down. When he told the complainer to go to bed, she made clear to him that she did not want to do so. Her acquiescence in doing so on the appellant's insistence would not be taken as an indication of consent to intercourse by any reasonable person. When he told her to lie down, she did so. When he began rubbing her back and then rubbing his body up and down against her, she did not respond. When he moved her underwear to one side, she did not respond. When he began to rub his penis against her bottom, she did not respond. When he inserted his penis into her vagina, she did nothing, because she was terrified. As the trial judge noted:

> She just lay there. She was frightened. He ejaculated. The complainer did not want to have intercourse with him. He did not even ask her if she wished to have intercourse. (paragraph 28)

Given that the jury convicted the appellant of rape, they must have accepted that the complainer's account was both truthful and accurate. On what basis, therefore, could they also have found that the appellant may have believed that she had nonetheless consented to intercourse? The complainer lay on the bed, one might say, like a plank of wood. She was entirely passive. At no point did she do or say anything which might be taken to indicate that she was a willing participant, far less an 'enthusiastic' one, as the appellant later claimed.

[19] Submission to intercourse and a lack of resistance do not equate to consent. Women often 'freeze' when being sexually attacked, and the disparity in physical strength which generally exists between the parties makes it unlikely that any resistance would be effective. That the complainer in this case did not shout and scream, physically attack or rebuff the appellant when he began his sexual advances could not be taken by any reasonable person to indicate consent to what followed. Indeed, her account was that she did not have intercourse *with* him. Rather, he did various things *to* her. There

was no reciprocation. She expressed no pleasure or enjoyment. The jury could not have accepted her testimony while simultaneously finding that the appellant had formed a reasonable belief that the complainer consented to intercourse. In sum, the jury in this case was presented with two very different versions of events: the complainer's version as described in the preceding paragraphs, or the appellant's police statement that her approach to the intercourse had been 'enthusiastic'. There was no evidential basis for a third 'mistaken' approach, since no right-thinking person could have construed the complainer's behaviour as tantamount to consent. As was made clear in *Quinn v HM Advocate* 1990 SCCR 254, a direction on error as to consent is not required when the sole issue is whether or not the complainer consented and there is 'no room for any halfway house' (per the Lord Justice Clerk (Ross), page 263). It therefore follows that the trial judge in the case before us was not at fault in failing to give a direction on mistaken belief in consent. I would accordingly dismiss this ground of appeal.

[20] The majority of this court applies *Meek* and *Jamieson* to the case before us. This may be because it is considered to be unfair to condemn and punish a person who makes a mistake, even an unreasonable one. To err is human, and it is generally less reprehensible to cause harm while labouring under an erroneous belief than to do so intentionally. But we do not always absolve those who act through error. Much depends on the magnitude of the error and the consequences for others of making it. When important rights are at stake, one can be blamed for giving them insufficient attention – or for failing to consider them at all. References to the reasonable person, reasonably based errors and the requirement of a reasonable belief in consent may create a misleading impression if this conjures up the image of a completely rational being who gives due consideration to all potential consequences before embarking on any course of action. This is not the standard set by the law. Where an accused person persists in sexual intercourse in the circumstances libelled in an indictment

such as the one in the present case, the resultant conviction is not founded on a failure to act 'reasonably' in the sense of having failed to assess the situation in a logical fashion. Rather, the conviction is merited on the basis that such a person has failed to display even the most basic sense of decency and consideration for others; in acting as he did, such an accused has treated the complainer as a 'thing', rather than as a person. It has rightly been suggested that the harm in rape is that it involves the sheer use of a person. The harm caused when a man has sexual intercourse with a woman who is not consenting is a particularly grave one. It is therefore incumbent on him to take especial care to ascertain whether or not the woman is a willing participant. The simple expedient of asking an unenthusiastic woman whether she wants to have sex removes any erroneous belief in consent.

Distress Constituting Corroboration of *Mens Rea*

[21] Turning to the third of the Lord Justice Clerk's issues (paragraph 4, above), the majority of this court declines to give a definitive answer to the penultimate question, since the appeal can be disposed of on other grounds. Nevertheless, the matter it raises is an important one which merits further consideration. The Crown has conceded that the *mens rea* of rape is a *factum probandum*, an essential fact, and that as such it must be proved by corroborated evidence. The question which then arises is whether distress exhibited by the complainer at some point after the incident is capable of corroborating her testimony, not only that she did not consent to intercourse, but that the accused *knew* that she did not consent, or was reckless as to consent. The Lord Justice Clerk concludes, albeit *obiter*:

> [I]t has not been suggested hitherto that such distress is capable of providing evidence of the existence of *mens rea* … the *de recenti* distress of the complainer may tell us about

her lack of consent; but I fail to see how it tells us anything about the accused's state of mind. (page 91, paragraph 16)

I concur with his Lordship's assessment that the testimony of a third party that the complainer exhibited distress shortly after the incident may corroborate the complainer's evidence that she did not consent to intercourse, but that it cannot establish that the accused was aware of a lack of consent at the time of intercourse. This is a well-established principle: *Gracey v HM Advocate* 1987 JC 45; *Smith v Lees* 1997 JC 73; *Fox v HM Advocate* 1998 JC 94. I do not, however, accept that the *mens rea* of an accused person requires to be established by corroborated evidence. No authority has been cited to us on the need for corroboration of *mens rea*, and it is my opinion that the Crown's concession ought not to have been made.

[22] It is, of course, correct that our law requires the essential facts of a criminal charge to be proved by means of two separate pieces of evidence. These essential facts in each case are that: (i) a crime was committed; and (ii) the accused was the person who committed it. These refer to the *actus reus* of the crime: in a theft charge, for instance, there must be corroborated evidence that the accused appropriated someone else's property without that person's consent; in an assault charge there must be corroborated evidence that the accused attacked the complainer. But the *mens rea* is commonly proved by inference from the circumstances of the *actus reus*: we infer that the person who took an item from a shop without proffering payment for it intended to steal that item; we infer from the fact that the accused was seen to punch the complainer in an unprovoked attack that the accused intended to cause personal injury to the complainer, and so forth. Hume explained the rationale for the corroboration requirement:

> No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect

> the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape. (II, page 383)

This makes clear that the requirement serves to minimise wrongful convictions based on mistaken testimony, a particular danger when the identification of the accused is a live issue at trial – hence the need for corroborated evidence that the accused was the perpetrator of the crime. Witnesses may not only be mistaken, they may also lie, and the requirement for two independent sources of evidence helps to safeguard against both of these contingencies. If a woman accuses a man of raping her, her word alone is insufficient – as with any other crime. But it is not the purpose of the corroboration rule to act as an insurmountable hurdle to conviction, and a requirement that the accused's *mens rea* be proved by corroborated evidence would make rape a crime which could rarely be proved. Sexual offences are generally committed in private, with only the accused and complainer present. From where would the inference come that the accused knew the complainer was not consenting, other than from her testimony? It is my view that corroborated evidence that intercourse took place, coupled with the complainer's evidence that she did not consent to this, if accepted by the jury, raises the inference that the accused was aware of the lack of consent, and establishes the crime of rape.

The State of Mind of the Complainer

[23] The final issue the Lord Justice Clerk addresses is whether the jury was entitled to hold that the complainer remained frightened of the appellant when he had intercourse with her. Since this raises a question of fact and is therefore properly a question for the jury, I agree with his Lordship that this is not a proper basis for appeal. Lord McCluskey takes a different view, however, and I feel bound to address this point. It seems that about four hours had elapsed between the appellant's *initial* threats of violence against the complainer (and indeed his assault on her by placing his hands around her

throat) and the act of intercourse. The presiding judge's account of the evidence does not, however, tell us how long an interval had elapsed between the *last* acts of violence, or threats of violence, and the sexual intercourse. Be that as it may, Lord McCluskey holds that it would have been possible for the jury to have concluded that at the point at which he directed the complainer to lie on the bed, the appellant may have believed that she had forgiven him for the previous assaults and threats to kill her and was now willing to have sexual intercourse with him. As his Lordship puts it:

> [O]ne view of the facts that the jury might have properly taken was that the sexual activity leading to full intercourse was a separate chapter of events from those involving violence and menacing behaviour on the part of the appellant … Thus there was clearly room for the jury to form the view that, although the complainer did not consent to the intercourse, and that therefore the *actus reus* was established, nonetheless the possibility that the appellant acted in the belief that she was consenting was not excluded. (page 100, paragraph 34)

In saying that this approach might 'properly' have been taken by the jury, Lord McCluskey must surely mean that, *as a matter of law*, such a position would be in keeping with the rulings in *Meek* and *Jamieson*, as previously described, namely that *any* erroneous belief – no matter how unreasonable – can absolve an accused from liability. This further illustrates the pernicious effects of these cases, since no reasonable person, and thus no reasonable jury, could hold that there was any basis on which the appellant could have formed a reasonable belief that the complainer consented, in the circumstances of the present case. The implications of *Meek* and *Jamieson* are that a man who genuinely believes that any woman who says 'no' to sex always means 'yes' merits an acquittal, as does a man who believes that his attractions and charms are such that no woman could be serious when she rejects and indeed resists his sexual advances. An acquittal is also required for a man who

treats dating like a contract, believing that having wined and dined a woman, the quid pro quo is that she must then have sexual intercourse with him. Such mind sets should find no succour in our law.

Conclusion

[24] This court should give an affirmative answer only to the first issue raised by the appellant. This court should now overrule *Meek* and *Jamieson.* It then follows that, since the *mens rea* of rape requires knowledge that the complainer is not consenting, or recklessness as to whether or not she is consenting, a person who ignores an obvious and serious risk that there is no consent acts recklessly, and an error as to consent is reckless if there is no reasonable foundation for such a belief. As previously noted, the crime of rape continues to be defined by the common law. Other English-speaking jurisdictions have modernised their sexual offence laws, such that rape is now defined to include male complainers, and is no longer limited to penile penetration. A comprehensive re-examination of Scotland's sexual offences is long overdue, to be carried out by the normal processes of law reform.

Reflective Statement – *McKearney v HM Advocate*

PAMELA FERGUSON

My judgment replaces that of Lord Kirkwood.

When invited to contribute a judgment, I knew immediately that I would want to focus on a case relating to rape. In 1993, I had drawn attention to shortcomings in the law,[1] and I later floated the idea that the corroboration requirement could be abolished in some types of rape cases[2] – this was 11 years before Lord Carloway made a similar, more general, recommendation.[3] But it was not only this long-standing desire for reform which led me to choose this case for the Feminist Judgments Project. Even after rape was redefined by the 2009 Act, I would mention *McKearney* so that the students were aware of the historical position. On each occasion, describing the case aroused in me a mixture of dismay and anger. Students would sometimes approach me after the lecture to share similar emotions. There was often a sense of disbelief that this was indeed the law.

McKearney offers a dispiriting view of sexual relationships, describing as it does a world in which men use violence and threats to intimidate women into submission.

It is commonplace that some men rape. Women grow up under the shadow of rape; we choose our routes home, limit the occasions in which we are alone with some men, and regulate many other aspects of our behaviour on a daily basis, all through fear of sexual attack. As a former

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1 Pamela R Ferguson, 'Controversial Aspects of the Law of Rape: An Anglo-Scottish Comparison' in Rosemary Hunter (ed), *Justice and Crime: Essays in Honour of The Lord Emslie* (Edinburgh, T&T Clark, 1993) 180–210. See also Pamela R Ferguson, 'Reforming Rape and Other Sexual Offences' (2008) 12 *Edinburgh Law Review* 302–07.

2 Pamela R Ferguson, 'Corroboration and Sexual Assaults in Scots Law' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (London, Routledge, 2000) 149–65.

3 *The Carloway Review: Report and Recommendations* (Scottish Government, 2011) para 4.0.14.

member of the fiscal service, I was well aware of the nature and frequency of such crimes, and the difficulties in securing convictions. But *McKearney* is not merely yet another example of an unsuccessful rape prosecution. Its most depressing aspect is the implications of accepting Lord McCluskey's perspective. His Lordship held that the jury ought to have been allowed to consider that the accused *may really have believed* that the complainer was consenting to have sex with him, despite his earlier assaults and threats to kill her. Adopting this perspective means, *at best*, that McKearney was prepared to have sex with someone who was entirely unresponsive, who lay rigidly on the bed. To quote again from the trial judge's notes, the complainer testified that McKearney '*did not even ask her* if she wished to have intercourse'.[4] The case shows us that some men see women as a means to an end and have little regard – or indeed no regard whatever – to what a woman herself might need, or want. We knew that this was so before *McKearney* was decided, and we know that it remains so now, 15 years later; one need look no further than the current US President, on record for remarking about women that: 'You have to treat 'em like shit',[5] and accused of having referred to 'grabbing' women 'by the pussy'.[6] The really depressing aspect of *McKearney* is not that this is how some men view the world, but that a Scottish court ruled that those who hold this view, and who act on this view – those who 'grab pussy' – and those who do far worse, are entitled to an acquittal.

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4 My emphasis.

5 The remark was made in in an interview with *New York Magazine*, and quoted in E Spiers, 'We Expect Trump to be Awful to Women. It's Part of his Brand', *Washington Post* (Washington, 20 February 2018) www.washingtonpost.com/news/posteverything/wp/2018/02/20/we-expect-trump-to-be-awful-to-women-its-part-of-his-brand/?noredirect=on&utm_term=.dc11c7a7196e.

6 'Trump Obscene Remarks were Real – TV Host Billy Bush' (*BBC News*, 14 December 2017) www.bbc.co.uk/news/world-us-canada-42224660.

All that mattered was that the accused believed that his behaviour was acceptable, and that a lack of response from the woman in question was irrelevant.

We have seen a shift in society from the widespread view that 'no' sometimes means 'yes' to greater acceptance of the view that 'no' actually does mean 'no'. It has, however, been pointed out that both these views treat women as the 'gatekeepers' of sex, according to which 'men initiate sex, and women either give or deny them access'.[7] If we move away from this approach and instead consider that a woman might actually 'be in it for pleasure',[8] then we should be encouraging a man to ask himself whether his partner is enjoying this particular encounter[9] (or perhaps – radical thought! – encouraging him to ask his sexual partner this question).

The law has come a long way since *McKearney* was decided. In particular, in the recent case of *Maqsood v HM Advocate*,[10] decided several months after I had finalised my judgment, the appeal court ruled that, in relation to the current definition of rape, a trial judge should continue to direct a jury that its definition includes an absence of reasonable belief in consent, but that 'no further direction on reasonable belief is required unless that is a live issue at trial'.[11] The court continued:

> That issue will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting.

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7 M Adshade and N McArthur, 'Beyond Consenting, Women actually Want to Enjoy Sex' *Globe and Mail* (Toronto, 19 January 2018) www.theglobeandmail.com/opinion/when-it-comes-to-sex-women-are-more-than-just-gatekeepers/article37665153.

8 Ibid.

9 Ibid.

10 *Maqsood v HM Advocate* [2018] HCJAC 747.

11 Ibid per Lord Justice General Carloway, para 17.

> That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding.[12]

Crucially, it was held that 'it is only intentional penetration and lack of consent that require to be proved by corroborated evidence'.[13] This is the antithesis of the approach in *McKearney*.

[12] Ibid.

[13] Ibid para 18.